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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JAIME HUGHES, ET AL.,

Plaintiffs,

v.

CITY OF STOCKTON, ET AL.,

Defendants.

No. CIV.S-03 0166 MCE-DAD

**PLAINTIFFS' POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION IN LIMINE TO EXCLUDE
DEFENDANT'S EXPERT MARK
COHEN**

DATE: June 28, 2005
TIME: 2:00 p.m.
COURTROOM: of Honorable Morrison
C. England, Jr.

Complaint Filed: January 28, 2003
Trial Date: June 29, 2005

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**THIS COURT SHOULD EXCLUDE DEFENDANT CITY OF STOCKTON'S PROFFERED
ECONOMIST MARK COHEN'S TESTIMONY FROM TRIAL**

Pursuant to Federal Rules of Evidence 104, 403, and 702 and this Court's "gate-keeping" role with respect to expert testimony, Plaintiffs, Virginia Cardoza, Mary Coronado, Kathi Lynn Coronado, Karen Delucchi, Jolene Gibson, Barbara Hedrick, Suzanne Henning, Jaime Hughes, Will Johnson, Maria Macias, Linda Mager, Audrey Mills, Mike Morrow, Candice Price, Virginia Ruiz, Carmen Simmons, Marina Torres, Treasa Tredwell, Sheila Wall and Lorie Weiss ("Plaintiffs"), request this Court exclude opinion testimony of and documents prepared by Mark Cohen ("Cohen"). He intends to opine that there is some kind of "effective wage" he has calculated and that Plaintiffs' annual compensation exceeds what they would have been compensated according to his effective hourly rates. Cohen's testimony is unreliable and does not fit the facts of this case because:

- Cohen is not qualified to offer his opinion,
- The lawful calculation of overtime to which Plaintiffs' are entitled is based on the "regular rate" as defined specifically by law and not based on Cohen's imaginary "effective rate",
- Cohen's opinion is based on incomplete information, and
- Cohen's method and conclusion do not fit the facts of this case.

For these reasons, Cohen's proffered testimony and documents prepared by him will not assist the trier of fact and should be excluded.

I

FACTUAL SUMMARY

This lawsuit arises from Plaintiffs' claim that the City of Stockton ("City") failed to properly compensate Plaintiffs in accordance with the Fair Labor Standards Act ("FLSA") for overtime each worked. Plaintiffs are/were Fire Telecommunicators employed by the City. Plaintiffs are hourly employees and are not exempt from the FLSA

overtime requirements. (See Undisputed Fact from the Court's Final Pre-Trial Order ("Undisputed Fact"), 6:4-5). Other than during training and a few months during 2001, Plaintiffs' regular schedule was made up of 24-hour shifts that resulted in them working 48 or 72 hours per workweek. (Undisputed Fact, 4:9-17). Plaintiffs are regularly scheduled to work approximately 2912 hours per year. (Undisputed Fact, 4:18-20).

The City produced records regarding Plaintiffs' pay and hours in response to discovery and as part of its initial disclosures in this action including but not limited to, Hours History Detail reports (different from those attached to Cohen's report), ECD Telecommunicators Overtime Reports, ECD Shift Staffing Summaries, Emergency Communications Division Work Cycle reports, Personnel Action Forms CS-23, and a Telecommunicator Pay Proposal. (Exhibit A)¹. Cohen did not review any of these documents. (Exhibit B).

The City also produced several witnesses in this action as their most knowledgeable regarding the City's payroll practices. The City produced Judy Ng ("Ng") and Nan Burnside ("Burnside") as persons most knowledgeable regarding Plaintiffs' pay stubs including the definition of "regular" and "overtime" as reflected on the pay stubs and how overtime on pay stubs is calculated. (Exhibits C and D). The City also identified Mark Parrott ("Parrott") as the person most knowledgeable regarding the Telecommunicator Pay Proposal dated August 31, 2000 and the relationship between the methodology used to calculate the data in the proposal compared to Plaintiffs' pay stubs. (Exhibit E).

The City's Director of Human Resources, Terry Parker ("Parker"), was deposed in this matter regarding Salary Schedules prepared by the City's Human Resource Department. (Exhibit F). The City's Salary Schedules do not contain an hourly rate, overtime rate or any calculation or formula to determine either rate. (Exhibit G).

¹ All exhibits identified in Plaintiffs' motion are attached to the Declaration of Stephanie A. Miller filed herewith. Exhibit A includes only samples of the documents identified and not all such documents that were produced to Plaintiffs' counsel.

1 Parker also verified the City's responses to interrogatories propounded by Plaintiffs.
 2 (Exhibit H). In response to Plaintiffs' interrogatories, the City described how it allegedly
 3 calculated Plaintiffs' hourly rate before and after November 2000. (Exhibit I). Cohen did
 4 not review the City's interrogatory responses. (Exhibit B). Cohen reviewed Salary
 5 Schedules but did not speak to Parker and did not review Parker's deposition transcript.
 6 (Exhibit B).

7 According to Cohen, he did not speak to anyone other than Ng and counsel for
 8 the City to prepare his report. (Exhibit B). Ng testified at her deposition that the
 9 computer performs all calculations, she does not know how the computer calculates Fire
 10 Telecommunicator pay, and she has nothing to do with calculating hourly rates or
 11 overtime rates for employees. (Exhibit C). Cohen did not review any depositions taken in
 12 this action. (Exhibit B).

13 Cohen's opinion is based on a method of calculation that is unreliable, does not
 14 fit the facts of this case, and is contrary to the law that controls how Plaintiffs may be
 15 lawfully paid. The Court in its "gate keeping" role should exclude Cohen's testimony.

16 II

17 SUMMARY OF ARGUMENT

18 This is not the typical case where the opinion of an economist is being used to
 19 show future lost earnings, earning potential, or even the value of a job. The material
 20 issue in this case is whether the City is compensating Plaintiffs lawfully for all the hours
 21 they work in a workweek. The City must pay Plaintiffs according to a lawful method
 22 prescribed by the FLSA, i.e. the overtime rate is based on the "regular rate" that is
 23 calculated according to the law. 29 U.S.C. 8207(a); 29 C.F.R. 88 778.108, 778.109
 24 (attached hereto as Exhibit I). Cohen's analysis does not show how the City allegedly
 25 calculates Plaintiffs' pay. Instead, the City is offering Cohen's testimony to create a
 26 method of calculating Plaintiffs' pay that results in what he calls an "effective rate",
 27 which is lower than the regular rate, and conclude Plaintiffs' annual compensation is fair.
 28 Whether or not Plaintiffs' annual compensation is fair or exceeds some contrived

1 “effective rate” is not a material issue in this case as those are not standards or defenses
2 under the law.

3 Cohen is not qualified to offer his opinion regarding the City’s pay methods or
4 the law that dictates how Plaintiffs must be paid. The law requires Plaintiffs’ overtime
5 compensation be based upon the “regular rate”. The Code of Federal Regulations defines
6 the regular rate and shows how to calculate the regular rate. The regular rate is a fact.
7 Cohen is not an expert on the FLSA or federal regulations interpreting the FLSA. His
8 method of using an “effective rate” is found no-where in the law. Cohen’s “effective rate”
9 is not the equivalent of the regular rate. Cohen also failed to educate himself on the City’s
10 City’s method of paying Plaintiffs.

11 Cohen lacks the essential qualifications and work experience to offer a reliable
12 and relevant opinion:

- 13 • He is not an expert on the FLSA or federal regulations
- 14 • His opinion is being offered to draw a legal conclusion
- 15 • He has no experience testing the lawful methods and exceptions to the
16 FLSA for calculating Plaintiffs’ pay
- 17 • He has not written any articles regarding compliance with the FLSA
- 18 • He has not written any articles regarding lawful exceptions to the FLSA
19 method of calculating pay rates or overtime rates
- 20 • He has never pursued a course of study on the FLSA

21 Cohen’s opinions and methodology lack the hallmark’s of reliability:

- 22 • His methodology is not based on any research independent of this
23 lawsuit
- 24 • He has no independent knowledge of the City’s pay practices that would
25 make him an expert as to how the City calculates Plaintiffs’ pay
- 26 • His methodology to calculate Plaintiffs’ pay came from counsel for the
27 City
- 28 • He relied on incomplete information to formulate his opinion

- His opinion is not based upon the City’s records, witnesses’ testimony, and verified discovery responses
- *and many other failures to conduct a rigorous inquiry*, described below.

Cohen’s opinions and conclusions do not “fit” the facts and circumstances of this case. Cohen’s conclusion that the City pays Plaintiffs an annual salary that is more than some contrived “effective wage” does not meet the elements of any standard under the FLSA, is not the basis for an affirmative defense, and will only confuse the issues in this case and mislead the jury.

Cohen’s testimony will not assist the trier of fact. In the exercise of its gate-keeping function prescribed by *Daubert*, this Court should exclude Cohen’s testimony and documents under Federal Rules of Evidence 104, 403, and 702.

III

COHEN’S OPINIONS ARE UNRELIABLE AND SHOULD BE EXCLUDED

A. Cohen Lacks Essential Qualifications to Offer His Opinion

As a preliminary matter, the Court must determine whether Cohen is qualified to offer his opinion in this matter. FED. R. EVID. 104(a) and 702. If Cohen is not qualified to offer his opinion, his testimony is inadmissible.² Although Cohen may be a qualified economist, the Court must examine whether he is qualified to offer his opinion in light of the specific facts and circumstances of the case. In this case where novel economic theories have no application and Cohen did not perform a rigorous examination of the facts, he is not qualified to offer his opinion.

Cohen’s *curriculum vita* does not cite any experience or expertise regarding the FLSA and related federal regulations. (Exhibit B). His method of calculation is not based on a method prescribed by law, i.e. the “regular rate”. 29 U.S.C. 8207(a); (Exhibit

² The City has the burden of laying a proper foundation for their expert’s testimony and to establish that admissibility requirements have been met by a ‘preponderance of the evidence.’ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. at 592; 113 S.Ct. at 2796, n. 10; *Bourjaily v. United States*, 483 U.S. 171, 175 – 176, 107 S.Ct. 2775 (1987). The City cannot meet this burden.

1 I). Cohen is not educated on the FLSA and, has performed no independent or original
 2 research or authored any articles on the subject of the FLSA. (Exhibit B). Cohen offers
 3 the conclusion that Plaintiffs are paid more than “what they would have been paid”.
 4 Would have been paid according to what? The FLSA requires Plaintiffs’ pay be
 5 calculated based on the “regular rate”. Cohen uses what he refers to as the “effective
 6 rate”, which is found no-where in the law. Cohen does not have experience regarding the
 7 FLSA that would qualify him to opine that the lump sum the City pays Plaintiffs is
 8 adequate.

9 The manner in which the City actually calculates Plaintiffs’ pay is the material
 10 issue of fact in this case and not their overall annual compensation. Accordingly, the City
 11 is required by law to keep records that show how hourly employees such as Plaintiffs are
 12 paid. 29 U.S.C. 8211(c). The City also employs payroll and human resource employees
 13 whom it has held out as the most knowledgeable persons regarding how Plaintiffs are
 14 paid. (Exhibits C, D E and F). Cohen is not an expert regarding the City’s pay practices
 15 and did not perform a rigorous study of the City’s pay practices, as discussed in greater
 16 detail below. He has no relevant experience interpreting the City’s documents (he did not
 17 even review all the City’s documents regarding Plaintiffs’ pay) to determine what hours
 18 Plaintiffs were compensated for and at what rate.

19 Cohen’s lack of expertise and experience regarding the FLSA and the City’s
 20 pay practices make his opinions and methods of no assistance to the trier of fact and his
 21 testimony is inadmissible.

22 **B. The *Daubert* Line of Cases and Federal Rule of Evidence 702**
 23 **Demand a Rigorous Assessment of an Expert’s Methodology and His**
 24 **Application of It to the Facts**

25 This Court must evaluate the reliability of Cohen’s methodology and the
 26 soundness of his application of it to the facts of this case – excluding his testimony if it
 27 cannot assist the trier of fact. The Court’s role is to act as a “gatekeeper”, to exclude
 28 unreliable expert testimony. FED R. EVID. 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597; 113 S.Ct. 2786, 2798 (1993). This gate-keeping function applies

1 to expert testimony deemed non-scientific. *Kumho Tire Co., LTD v. Carmichael*, 526
 2 U.S. 137, 147, 119 S.Ct. 1167, 1174 (1999). “[N]either the difficulty of the task nor any
 3 comparative lack of expertise can excuse the judge from exercising the ‘gatekeeper’ duties
 4 that the Federal Rules of Evidence impose – determining, for example, whether particular
 5 expert testimony is reliable and ‘will assist the trier of fact....’” *General Electric Co. v.*
 6 *Joiner*, 522 U.S. 136, 148, 118 S.Ct. 512 (1997).

7 The Court is required to determine (1) nothing less than whether the experts
 8 testimony is reliable, taking into consideration whether his opinion reflects some
 9 specialized knowledge and his findings are derived from reliable methods and (2) ensure
 10 that the proposed expert’s testimony is relevant to material aspects of the case.

11 The standards of reliability are codified in Federal Rule of Evidence 702 as
 12 amended in 2000:

13 If scientific, technical, or other specialized knowledge will assist the
 14 trier of fact to understand the evidence or to determine a fact in
 15 issue, a witness qualified as an expert by knowledge, skill,
 16 experience, training, or education, may testify thereto in the form of
 17 an opinion or otherwise, if (1) the testimony is based upon sufficient
 data, (2) the testimony is the product of reliable principles and
 methods, and (3) the witness has applied the principles and methods
 reliably to the facts of the case.

18 The language of new Rule 702, as well as the advisory committee’s notes to
 19 the new Rule, makes it clear that the Court is now required to screen expert testimony and
 20 determine whether the reasoning and methodology underlying the testimony is valid, and
 21 to ensure it stems from reliable methodology, a sufficient factual basis and reliable
 22 application of the methodology to the facts. *Daubert*, 509 U.S. at 592 – 593; *DSU*
 23 *Medical Corporation v. JMS Co., Ltd.*, 296 F.Supp.2d 1140, 1146 (N.D. Cal. 2003); *Rudd*
 24 *v. General Motors Corp.*, 127 F.Supp. 2d 1330, 1337 (M.D. Ala. 2001)

25 In *Daubert*, the Supreme Court described the following factors to guide the
 26 court in its Rule 702 analysis: whether a theory or technique can be or has been tested,
 27 whether a theory or techniques has been subject to peer review or publication, whether a
 28 theory or technique is widely accepted by other similar experts, the known or potential

1 rate of error of a technique, and standards controlling the technique's operation. *Daubert*,
 2 509 U.S. at 593-594, 113 S.Ct. at 2796-97. The Rule 702 inquiry is a flexible one and the
 3 Court is not limited to applying only the factors from *Daubert*. *Kumho Tire*, 526 U.S. at
 4 150, 119 S.Ct. at 1175; *Daubert*, 509 U.S. at 594, 113 S.Ct. at 2797. The *Daubert* factors
 5 were "meant to be helpful and not definitive." *Khumo Tire*, 526 U.S. at 151, 119 S.Ct. at
 6 1175.

7 Although Rules 401 and 402 reflect the general policy of the Federal Rules for
 8 liberal admission of evidence, Rule 403, working in conjunction with Rules 702 and 703,
 9 militates against this general policy by giving courts broad discretion to preclude expert
 10 testimony unless it passes more stringent standards of reliability and relevance. *Nadell v.*
 11 *Las Vegas Metropolitan Police Dept.*, 268 F.3d 924, 927 – 928 (9th Cir. 2001); *Allison v.*
 12 *McGhan Medical Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999). The potential impact of
 13 expert testimony on the jury necessitates more stringent standards. *Allison*,. 184 F.3d at
 14 1311-12. Here, where the jury will be wading through an abundance of testimony and the
 15 law is extensive, a jury will be awestruck by an expert purporting to show them a
 16 conclusion and will be less equipped than the judge to make reliability and relevance
 17 determinations. *Allison*, 184 F.3d at 1310. "The judge's role is to keep unreliable and
 18 irrelevant information from the jury because of its inability to assist in factual
 19 determinations, its potential to create confusion, and its lack of probative value." *Allison*,
 20 184 F.3d at 1311-12. "Expert testimony can be both powerful and quite misleading
 21 because of the difficulty in evaluating it. Because of this risk, the judge in weighing
 22 possible prejudice against probative force under Rule 403 of the present rules exercises
 23 more control over experts than over lay witnesses" *Daubert*, 509 U.S. at 595, 113 S.Ct. at
 24 2798 (quoting *Thomas v. Taylor*, 138 F.R.D. 614, 632 (1991)). The City's proposed
 25 economic expert fails these stringent standards.

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C. Defendant's Expert is Not Reliable

1. Cohen's Method is Not the Method Prescribed Specifically by Law

Lawful methods of calculating Plaintiffs' pay are established specifically by statute; one and one half times the regular rate for all hours worked in excess of forty in a workweek. 29 U.S.C. 8207(a). The regular rate is the basis for Plaintiffs' overtime rate. The Code of Federal Regulations defines the "regular rate" and specifically sets out how to calculate the regular rate. (Exhibit I). Cohen does not calculate the regular rate and use it in the manner prescribed by the FLSA. Instead, he calculates an "effective rate". He does not sufficiently define or test the technique of using an "effective rate". He does not establish an effective rate is one traditionally relied upon by other economists under similar circumstances. The so-called "effective rate" is not the equivalent of the regular rate. Cohen's use of an effective rate is unreliable and irrelevant.

2. Cohen's Opinion is Unreliable Because He Relies on Incomplete Information

Cohen's opinion is also unreliable because he draws conclusions regarding Plaintiffs' compensation without relying on numerous City records, City witnesses, and discovery in this case regarding how the City actually pays Plaintiffs. The issue in this case is whether the City's pay method violates the FLSA and does not compensate Plaintiffs for all hours worked. Cohen merely concludes the City's annual compensation to Plaintiffs was more than what he calculated using an effective rate without considering whether it compensated Plaintiffs for all hours worked. He assumes Plaintiffs were compensated for all the hours they worked at a lawful rate of pay. Without examining evidence in this case regarding how the City compensates Plaintiffs, Cohen cannot reliably reach these conclusions.

Cohen only spoke to Ng, from the City's payroll department. At her deposition, Ng stated that she did not know how the hourly rate and overtime rates were calculated. (Exhibit C). Cohen did not interview any other City employees or review any

1 deposition transcripts in this case. (Exhibit B). Cohen did review the City's Salary
 2 Schedules, which state lump sum amounts without showing the hours compensated or any
 3 method for calculating hourly or overtime rates. (Exhibit G). The Stockton City Council
 4 Resolution reviewed by Cohen also does not include specific information regarding
 5 Plaintiffs' compensation. (Exhibit J). The origin of the Hours History Detail reports
 6 attached to Cohen's report is unknown, they are not bates stamped. (Exhibit B). They
 7 also do not include hourly rates or overtime rates used by the City. The Direct Deposit
 8 Advice documents Cohen reviewed for each of the three sample Plaintiffs are incomplete.
 9 (Exhibit B).

10 Cohen did not rely on a number of City records regarding each Plaintiffs'
 11 compensation. (Exhibit A). These documents state information regarding rates the City
 12 allegedly used, hours worked, and hours deducted for the purpose of calculating Plaintiffs'
 13 compensation. (Exhibit A). Cohen's opinions do not take into account any of this
 14 evidence.

15 The fact that Cohen ignored an abundance of evidence in this case regarding
 16 how Plaintiffs' are compensated, makes his testimony unreliable.

17 **D. Cohen's Method and Conclusions Do Not "Fit" A Material Aspect of**
 18 **this Case**

19 The "effective rate" calculated by Cohen does not "fit" the facts and material
 20 issues of this case. *See Daubert v. Merrell Dow Pharmaceuticals, Inc. (Daubert II)*, 43
 21 F.3d 1311, 1320 (9th Cir. 1995). The effective rate will not assist the trier of fact in
 22 determining whether the City paid Plaintiffs lawfully and for all hours they worked during
 23 a workweek because the effective rate is not the regular rate upon which Plaintiffs'
 24 compensation must be based.

25 The effective rate used by Cohen is not the product of a lawful calculation
 26 under the FLSA and cannot be derived simply by examining the Salary Schedules, which
 27 according to him were the documents he consulted. (Exhibits B and G). Cohen basis his
 28 calculations on 2928 and 2904 hours worked per year. (Exhibit B). However, the City

1 alleges the salaries on the Salary Schedule are intended to compensate Plaintiffs for 2912
 2 annual hours of work (based on an average of 56 hours worked per workweek). (Exhibit
 3 H). Cohen's use of 2928 and 2904 annual hours of work for purposes of calculating
 4 effective pay rates violates the FLSA and contradicts the facts in this case.

5 Cohen's comparison of the effective wage to Plaintiffs' alleged annual
 6 compensation, ignores the City's alleged method of calculating Plaintiffs' pay rate, which
 7 is the primary issue in this case. In the City's answers to interrogatories, verified by
 8 Parker, it alleges "[f]rom November 2000 to present, Plaintiff's weekly salary
 9 compensates Plaintiffs for 40 straight time hours and 16 overtime hours. For accounting
 10 and payroll purposes, Defendant's Finance Department calculates the hourly rate by
 11 multiplying the monthly salary by 12, the product is then divided by 2912 hours."
 12 (Exhibit H). Cohen does not apply this alleged method of calculating Plaintiffs' hourly
 13 rate. (Exhibit B). The material issue of whether Plaintiffs are lawfully compensated for
 14 all hours worked remains unanswered by Cohen.

15 The conflict is demonstrated as follows: according to Cohen's report, Lori
 16 Weiss was a Fire Telecommunicator II at pay step 6, annual salary of \$49,416 for the year
 17 2001. Even assuming Plaintiffs' annual salary is intended to compensate for all regularly
 18 scheduled hours including regularly scheduled overtime (according to the City this
 19 equates to an average of 2912 hours per year), the hourly rate is \$16.97 ($\$49,416/2912 =$
 20 $\$16.96978$). Cohen says the effective hourly rate for Weiss during this time period is
 21 either \$14.7442 or \$14.9023. Cohen's effective rate is also not the equivalent of the
 22 typical regular rate, which is based on a forty hour workweek; if you divide \$49,416 by
 23 Weiss' non-overtime hours (40 hours per week annually = 2080) the hourly rate is \$23.76
 24 ($\$49,416/2080 = 23.757692$), which is much higher than Cohen's effective rate. Cohen's
 25 method of reaching his conclusion conflicts with the facts of this case and the lawful
 26 calculations of the regular rate under the FLSA and Code of Federal Regulations.

27 Ultimately, the City will try to use Cohen's conclusion to prove that Plaintiffs'
 28 annual compensation as a whole is fair and therefore, it does not matter how it is

1 calculated. However, the fairness of Plaintiffs' annual salary is not a material aspect of
 2 this case. Court's have rejected equity arguments alleging total compensation is all that
 3 matters, regardless of whether the parties have complied with the specific requirements of
 4 the FLSA. *See Wheeler v. Hampton Township*, 399 F.3d 238 (3d Cir. 2005). Cohen's
 5 conclusory statement regarding Plaintiffs' total annual compensation and his calculation
 6 of effective rates, not prescribed by law, do not fit the facts in this case.

7 Cohen's opinion is also not relevant to the damages phase of this case because
 8 the effective rate he calculates is not tied to the facts in this case and is unreliable.

9
 10 **E. Cohen's Testimony Will Confuse and Mislead the Jury and Should
 be Excluded Under FRE 403**

11 If the probative value of Cohen's testimony is outweighed by danger of unfair
 12 prejudice, confusion of the issues, misleading the jury, or consideration of undue delay,
 13 waste of time, or needless presentation of cumulative evidence it may be excluded under
 14 Federal Rule of Evidence 403. Even if this Court finds there is some relevance to
 15 Cohen's testimony, any probative values is clearly outweighed by the danger in this case
 16 of confusing the issues and misleading the jury. A jury is likely to give Cohen's opinion
 17 great weight based on the fact the City identifies him as an expert. Cohen's theory is not
 18 grounded in any reliable method that complies with the law or fits with the facts of this
 19 case. His theory is at odds with the evidence in this case. The risk of confusion by
 20 presenting his theory, which flies in the face of the law and the facts the jury will hear,
 21 makes exclusion under Rule 403 appropriate.

22 **IV**

23 **CONCLUSION**

24 Plaintiffs' respectfully request the Court exclude the testimony and documents
 25 prepared by the City's proffered expert economist, Mark Cohen. Cohen is not qualified to
 26 offer his opinion, his method and opinions are unreliable and do not fit the facts of this

27 ///

28 ///

1 case. The Court should exercise its gate-keeping role to exclude Cohen's testimony
2 completely, or make any other limiting order the Court deems appropriate.

3 Dated: June 7, 2005

4 CARROLL, BURDICK & McDONOUGH LLP

5
6 By _____ /s/ Stephanie A. Miller

7 Stephanie A. Miller

8 Attorneys for Plaintiffs

9 JAIME HUGHES, et al.